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Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Nielson v. Central Waterworks*, No. 17333 (Utah Supreme Court, 1980).
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IN THE SUPREME COURT
OF THE STATE OF UTAH

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ROBERT S. NIELSON and ILA DEAN NIELSON,

Plaintiffs and
Appellants,

vs.

CENTRAL WATERWORKS COMPANY, a Utah corporation, and the STATE OF UTAH, by and through its Department of Water Resources,

Defendants and
Respondents.

Case No. 17333

- - - - - - - - - - - - - - - - - - - -

BRIEF OF APPELLANTS

An Appeal from the Judgment of the Sixth Judicial Court of Sevier County, The Honorable Don V. Tibbs, Judge

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FILED
DEC - 8 1980
Clerk, Supreme Court, Utah

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BRIEF OF APPELLANTS

NATURE OF THE CASE

This is an action for a judgment declaring that the assets of a culinary water system, located in the unincorporated town of Central, Utah, be administered in conformance with the equal protection clauses of the Constitutions of the United States and the State of Utah, and for damages stemming from a denial of appellants' constitutional rights.

DISPOSITION IN LOWER COURT

Central Waterworks Company and the State of Utah, by and through its Division of Water Resources, made separate motions for summary judgment against the plaintiffs on July 23, 1980

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and August 8, 1980, respectively. The motions for summary judgment were heard by the District Court on August 20, 1980. On August 26, 1980, the Court entered an order granting the separate motions for summary judgment of the defendants.

RELIEF SOUGHT ON APPEAL

Plaintiffs request that the judgments entered below be reversed and the matter remanded to the District Court.

STATEMENT OF FACTS

Robert S. Nielson and Ila Dean Nielson are the owners of a parcel of land, approximately 7 acres in size, which is situated in the unincorporated town of Central, Utah. (R. pp. 1-3, pl. comp.) On or about September 15, 1975, the Nielsons, desiring to subdivide the parcel into 18 home sites, applied to Central Waterworks Company (hereinafter "Central") for the water connections prerequisite to the planned subdivision. (R. p. 2).

Central is a Utah non-profit corporation engaged in the business of supplying water to its shareholders in and around Central, Utah. (R. pp. 1, 10, 36). In 1952 and again in 1973, Central entered into agreements with the State of Utah, through its Department of Water Resources or predecessor agency, to construct a culinary water system. (R. pp. 1, 2, 32, 36, 49, 50, 52). Under those contracts, the State financed all or most of the improvements and took title to

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all the physical assets, including water rights and easements, of Central. Central was allowed to retain beneficial use of the system under a repurchase (without interest) agreement. (R. pp. 52-54).

Central denied the Nielsens' application, claiming that its water supply was insufficient to service 18 additional connections. Investigation by the Nielsens, however, revealed that Central's water supply was more than adequate. A renewed application for the connections was denied by Central, based on an alleged rule of the company that only one water connection would be provided for each acre of property. (R. pp. 2, 3).

A further investigation by plaintiffs revealed that Central, while purporting to operate under the "one connection one acre" rule, had in fact granted connections to applicants for five parcels of land having acreages of .91, .836, .83, .43, and .21 acres. (R. p. 3). The Nielsens' reapplication for water connections was again denied. (R. p. 3).

ARGUMENT

POINT I

CENTRAL WATERWORKS' DENIAL OF CONNECTIONS TO THE APPELLANTS CONSTITUTES STATE ACTION

Every cause of action emanating from a violation of a person's right to equal protection under the law faces the

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threshhold requirement of "state action." U.S. Const. amend. XIV, §1; Utah Const. art. I, §2. Essentially, the issue is one of classification: The acts complained of either constitute state action or they don't. Despite the cut and dried appearance of the result, there is no litmus paper test for the presence or absence of state action. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." Burton v. Wilmington Parking Authority, 365 U.S. 715, 722, 6 L.Ed.2d 45, 50, 81 S.Ct. 856 (1961).

A. State Action Arises from the "Symbiotic Relationship" Between the State and Central Waterworks.

An inquiry into the presence of state action must begin with an examination of the relationship between the State and the private party. The leading United States Supreme Court case on this question, Burton v. Wilmington Parking Authority, supra, provides some insight in its delineation of some of the factors which indicate state action. In Burton, the court found state action where a restaurant located in a state-owned parking garage practiced racial discrimination.

Initially, the court in Burton found it important that the restaurant was an integral part of the state's plan to provide financially self-sustaining parking garages. The Wilmington Parking Authority had leased space to a segre-

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gated restaurant as a means of financing its parking garage. In short, the restaurant was seen as a tool of the Authority for achieving its "essential governmental functions." Id. at 723, 6 L.Ed.2d at 51.

Similarly, the State of Utah, through its Department of Water Resources, has used Central Waterworks and others similarly situated as an integral part of a statutory scheme aimed at promoting efficient use of available water resources. Utah Code Ann. §73-10-1, et seq. (1953). §73-10-1(3) establishes the policy "that water, as the property of the public, should be so managed by the public that it can be put to the highest use for public benefit." Pursuant to this policy and other provisions of the Act, the State financed the vast majority of the two projects, taking legal title to the company's physical assets until such time as Central Waterworks repurchased the projects. It should also be noted that the sums advanced by the State were subject to repayment without interest.

State ownership of the assets of a private party has been held to be a strong indication of the presence of state action. In Burton, state ownership of the parking garage was cited by the court as one of the controlling factors. Id. at 723, 6 L.Ed.2d at 51. Furthermore, the court noted that the parking authority could have required the restaurant, through its lease, "to discharge the responsibilities

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under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation. But no state may effectively abdicate its responsibilities by either ignoring them or failing to discharge them whatever the motive may be." Id. at 725, 6 L.Ed.2d at 52. In short, the State of Utah has an affirmative obligation to insure that property owned by the State is operated within the bounds of the Fourteenth Amendment.

In Holodnak v. Avco Corporation, 514 F.2d 285 (2d Cir. 1975), cert. denied, 421 U.S. 1013, 46 L.Ed.2d 123, 96 S.Ct. 188 (1975), the discharge of an employee of a defense contractor for allegedly publishing an article critical of his employer was held to be state action. The land upon which Avco's plant was built, as well as the buildings and most of the machinery, were owned by the United States. In addition, both the government and Avco benefitted from the operation of the plant. Under such circumstances, the Second Circuit held that the employee's discharge was state action.

Many of the factors which the Second Circuit considered important in Holodnak are present in the instant case. For example, the State of Utah owns the physical assets of Central Waterworks, thus indicating a special relationship between the defendants. Moreover, state ownership of physical assets used by a private party carries with it the obligation of insuring that the state's property is administered

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in a nondiscriminatory fashion. Burton v. Wilmington Parking Authority, 365 U.S. at 725, 6 L.Ed.2d at 52.

The issue of state action is also discussed in Janusaitis v. Middlebury Volunteer Fire Department, 607 F.2d 17 (2d Cir. 1979), where the level and kind of State involvement are similar to the instant case. In Janusaitis, a former member of a town's volunteer fire department brought a civil rights action against the fire department chief and members of the department's executive committee, alleging that his suspension and dismissal violated constitutional guarantees of free speech and due process. The district court dismissed the complaint, holding that there was no state action; moreover, even if there was state action, dismissal of the fireman did not violate First Amendment guarantees. Janusaitis v. Middlebury Volunteer Fire Department, 464 F. Supp. 288 (D.C. Conn. 1979). Upon appeal, the Second Circuit affirmed the district court on the latter ground; however, the Court of Appeals held that the actions of the volunteer fire department in dismissing the fireman constituted state action and could offend the First Amendment.

The Second Circuit relied upon Holodnak and Burton in finding the presence of a "symbiotic relationship" between the Town of Middlebury and the volunteer fire department. The fire department used land, buildings and fire fighting

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equipment owned by the town; moreover, the town had a distinct interest in providing protection from fires. Likewise, Central Waterworks' assets, including water rights, are owned by the State of Utah. In addition, the Department of Water Resources has a statutory mandate to insure the conservation and efficient use of the State's water supply.

State action is present when the sifting of facts and weighing of circumstances reveals a special relationship between the State and a private party. In the instant case, the Department of Water Resources and Central Waterworks have combined their efforts to promote the efficient use of Utah's water resources. While Central may have purely selfish interests at heart, the State's involvement comes only at the direction of the legislature to finance and take title to water projects which put the State-owned resource to its highest beneficial use. See Utah Code Ann. §73-10-1(7) (1953). Since the State owns all waters of the State, Utah Code Ann. §73-1-1 (1953), subject to beneficial use, Utah Code Ann. §73-1-3(1953), the State benefits directly by financing projects which conserve the resource. The interests and acts of the State and Central are so "intertwined that the State must be recognized as 'a joint participant in the challenged activity. . ..' Burton, supra, 365 U.S. at 725, 6 L.Ed.2d at 52, 81 S.Ct. at 862." Janusaitis, supra, 607 F.2d at 23.

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Since a symbiotic relationship is present, the State and Central Waterworks are required to administer the water system in conformance with the Constitutions of the State of Utah and the United States.

B. State Action Is Present in Central Waterworks' Performance of a Traditionally Governmental Function.

The Articles of Incorporation of Central Waterworks Company state that one of the purposes for which the corporation was organized was the "distribution of water to the inhabitants and citizens of the Town of Central, Sevier County, State of Utah, and users nearby or within a short distance of said town." (R. p. 55). The distribution of water is traditionally a governmental function; however, in some cases, areas without appropriate subdivisions of government may rely upon private corporations for their water. While the entity providing water service may be a private corporation or person; nevertheless, the service provided remains traditionally governmental in character. This is particularly the case where the private entity is, at least fiscally, a creature of the state.

In Jackson v. Metropolitan Edison Company, 419 U.S. 345, 352, 42 L.Ed.2d 477, 485, 95 S.Ct. 449, 454 (1974), the court recognized that there could be "state action present in the exercise by a private entity of powers traditionally

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exclusively reserved to the state." For example, in Marsh v. Alabama, 326 U.S. 501, 90 L.Ed. 265, 66 S.Ct. 275 (1946), the Supreme Court held that a Jehovah's Witness could not be prosecuted by the state for trespassing while distributing religious literature on the streets of a company town. The company town in Marsh had all the attributes of a municipality, with the exception that title to the property was vested in a private corporation. The court, noting that the state should not permit a corporation to govern a community of citizens so as to restrict their fundamental liberties, held that the more a private party resembles and acts like a governmental entity, the more likely an inference of state action will be drawn. In short, Marsh held that a private party could be subject to constitutional restrictions in the exercise of traditionally governmental activities.

Here, Central Waterworks has developed a monopoly on the delivery of water in the area. Furthermore, Central, with the encouragement and blessing of the State Department of Water Resources, has defended its exclusivity by protesting a well application by plaintiffs on their property. Finally, Central Waterworks has imposed a thinly veiled zoning regulation under its "one connection one acre" rule. Under the rule of Marsh, Central Waterworks has effectively abandoned its claim to immunity under the Fourteenth Amendment.

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See also Evans v. Newton, 382 U.S. 296, 15 L.Ed.2d 373, 86 S.Ct. 486 (1966).

In Janusaitis v. Middlebury Volunteer Fire Department, supra, the Second Circuit held that fire protection is a governmental activity and subject to constitutional limitations. Consequently, the actions of the volunteer fire department in dismissing the fireman could offend the First Amendment even though the municipality took no active part in the dismissal. In short, it is well established that the acts of a private entity may be state action solely because of the business or activity which the private entity pursues.

POINT II

RELIEF MAY BE GRANTED AGAINST CENTRAL WATERWORKS FOR VIOLATIONS OF APPELLANTS' CONSTITUTIONAL RIGHTS.

As previously noted, the categorization of Central Waterworks as a "private" corporation does not insulate the company from the Constitution. In addition, the word "private" does not prevent the court from granting appropriate relief to the appellants. Where a finding of state action is made, it is clearly appropriate for remedial measures to be directed toward the private party as well as the state. Burton v. Wilmington Parking Authority, supra. Otherwise, "the difficulty of separating private from governmental action for remedial purposes would often preclude any effective relief."

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Holodnak v. Avco Corporation, 514 F.2d 285, 292 (2d Cir. 1975).

The Second Circuit also noted in Holodnak, that:

> It goes without saying, where a nominally private party has been allowed to exercise powers traditionally reserved to the government itself, it will no longer be treated for remedial purposes as a 'private party.' See, e.g., Marsh v. Alabama, 327 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946) (company town); Evans v. Newton, 382 U.S. 296, 86 S. Ct. 486, 15 L. Ed.2d 373 (1966)(municipal park).

Holodnak, supra, at 292 n.7. In short, relief may be granted to the appellants against both Central Waterworks and the State of Utah regardless of which version of state action, or combination thereof, is found to exist. Regardless of whether state action stems from a symbiotic relationship between Central Waterworks and the State of Utah or from the fact that Central Waterworks performs a traditionally governmental function, the court may require that the assets of Central Waterworks be administered with due regard to appellants' constitutional rights.

CONCLUSION

Central Waterworks' denial of water connections to the appellants is State action within the purview and protection of either the Utah or United States Constitutions. The symbiotic relationship between the respondents, characterized by the mutual benefits conferred by the venture and State

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ownership of Central's assets, gives rise to state action in the arbitrary and capricious acts of Central. Furthermore, Central, in performance of a traditionally governmental function, has shed the cloak of immunity normally retained by a private entity. Finally, the Court may grant appellants relief as against both respondents, even though Central is nominally a private entity.

In view of the fact that the apppellants have stated a cause of action upon which relief may be granted, the judgments of the lower court should be reversed and the matter remanded to the District Court.

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CERTIFICATE OF SERVICE

I hereby certify that I mailed two (2) copies of the foregoing Brief of Appellant to: Tex R. Olsen, Esq., Olsen and Chamberlain, 76 South Main, Richfield, Utah 84701, and Dallin W. Jensen, Esq., and Michael M. Quealy, Esq., 301 Empire Building, 231 East 400 South, Salt Lake City, Utah 84111, postage prepaid, on this 8th day of December, 1980.

Bryce D. Panzer

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